

The evidence of young children: Establishing the truth in South African criminal courts

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ABSTRACT

This article critically addresses the manner in which accurate information from child witnesses is obtained in criminal proceedings. Although establishing the truth is a primary objective in criminal proceedings, young children are often excluded from the criminal justice system by being characterised as unreliable witnesses. The cognitive development of young children is explained and the article emphasises the crucial need for the proper training of judicial officers in the various developmental changes in the cognitive development of young children. The Appeal Court's decision in *S v B* is discussed and welcomed as it is envisaged that this decision will bring justice to victims of child sexual abuse. The inability of a young witness to understand the oath should be clearly distinguished from such a child's reliability as a witness. Finally, the recommendation is put forward that no distinction should be made between sworn and unsworn evidence and the Sexual Offences Draft Bill's recommendation for the abolition of the competency test, is supported.

Introduction

Adults have from time immemorial regarded children's evidence with scepticism. In court the child witness, instead of the accused who has only to deny his or her guilt, has to convince the court that he or she is mature and reliable enough to narrate events truthfully. This article critically analyzes the evidence of child witnesses in sexual abuse cases. It also discusses the competency of young children to testify and the administration of oaths by presiding officers to children as witnesses or complainants. It is argued that although establishing the truth and obtaining accurate information from child witnesses is the primary objective in criminal proceedings, the manner in which this is done effectively excludes young children from the criminal justice system. It is thus argued that adults working with children should have knowledge of child development. The last part of this article discusses the

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cognitive development of children. It argues that the triers of fact, especially attorneys, should recognize young children's limitations as witnesses.

The child's evidence

It has become increasingly difficult to detect and to prove child sexual abuse. One reason for this is the suspicious manner in which adults approach this issue. Adults' wariness of children's statements is a reflection of adults' and society's cultural beliefs. Most cultures including ours hold ambivalent views about children. Children are sometimes seen as innocent, truthful and incapable of fabricating false allegations, especially those involving sexual matters. On the other hand, children may be seen as creatures of uncontrolled sexual fantasies, unreliable and prone to suggestion.¹ This ambivalence towards children has resulted in judges and magistrates being given unbridled discretion in screening the testimony and competency of child witnesses.

The prejudice against children is more pronounced where they are female complainants. Female complainants of sexual abuse have always been regarded as untruthful. This misogynist attitude adopted by society as a whole has led to the unfortunate perception that complaints of sexual abuse by children are false, more so if the child victim is a female.

Child sexual abuse continued unabated through the centuries until a turning point was reached during the 1960s when professionals started to focus on the seriousness of this social problem. Up to that point there was a perception among adults that children were not sexually abused, hence the judicial system did not make provision for child witnesses or complainants. It is now generally accepted that young children are often victims of sexual abuse. Nevertheless, old prejudices still persist and their evidence in court is always treated with caution. Most adults are of the view that children lack the maturity required to answer questions truthfully.² To date, young children are in most cases still regarded as untruthful despite research findings to the contrary.³

¹ GL Peiris 'Corroboration of the evidence of complainants in sexual cases, children, and moral delinquents: A comparative analysis of modern Roman-Dutch Law and English Law' (1981) *Acta Juridica* 119; GS Goodman 'Children's testimony in historical perspective' (1984) 40 *Journal of Social Issues* 9 at 11; JR Spencer and R Flin 'Child witnesses – are they liars?' (1989) *New LJ* 1601.

² Spencer and Flin op cit (n1) 1601-2; JR Spencer and R Flin *The Evidence of Children: The Law and the Psychology* (1990) 238; A Wilmont 'The cautionary rule in sex crimes' (1992) 5 *SACJ* 211 at 212; S Jagwanth and PJ Schwikkard 'An unconstitutional cautionary rule' (1998) 11 *SACJ* 87 at 88-9.

³ For instance, in *R v W* 1949 (3) SA 772 (A) at 780, the court held, 'The evidence of young children is properly treated with caution; it has its own special elements of risks'. In *S v V* 2000

Children are required to possess the following characteristics to testify as witnesses.

The child should have the capacity to observe

The capacity to observe is defined as the cognitive ability to employ the senses to receive and register reasonably accurate events.⁴ Research findings on the ability of children to observe and remember events conclude that, while there are developmental differences between adults and children, it cannot be said that in general children notice less than adults. Johnson and Foley⁵ are of the view that children are able to observe some events, which go undetected by adults. The general view is that the old bromide that children observe less than adults should be discarded because children do not generally forget events that fall within their frame of experience.⁶ In most cases where they are called as witnesses they have shown an ability and capacity to observe, register a perception and remember it.

The child should have an adequate memory

A child witness is required to have the capacity to remember the event he or she is required to describe. Memory is the ability to acquire, store and retrieve information.⁷ When a child testifies about the occurrence of past events, he or she must do so from present memory of such an event. Unfortunately memory does not exist as a concrete item, like a book or stone tablet.⁸ There is no guarantee that memory can be read back accurately at the trial. Rather, memory is a process subject to a variety of influences that can alter its accuracy.⁹ The process of memory is generally divided into three stages, namely, acquisition, retention and retrieval.¹⁰

The acquisition stage relates to the contemporaneous perception and encoding of an event in memory. If the event is encoded into the memory imperfectly, recollections of the event through later testimony will necessarily

(1) SACR 453 (SCA) 454; *S v J* 1998 (2) SA 984 (SCA) at 1009B, the triers of fact alluded to risks in children's evidence and the need to proceed with caution.

⁴ JEB Myers and NW Perry *Child Witness Law and Practice* (1987) 55.

⁵ MK Johnson and MA Foley 'Differentiating fact from fantasy: The reliability of children's memory' (1984) 40 *Journal of Social Issues* 33 at 34.

⁶ Myers and Perry op cit (n4) 75.

⁷ K Müller and K Hollely *Introducing the child witness* (2000) 192.

⁸ TC Feher 'The alleged molestation victim, the rules of evidence, and the Constitution: Should children really be seen or heard?' (1986-7) 14 *AJCL* 227 at 228; K Müller and Hollely op cit (n7) 192-5.

⁹ K Müller and Hollely op cit (n7) 192.

¹⁰ Ibid.

be imperfect. Encoding of a memory may be affected by the prior knowledge of an event, duration and repetition of the original event.¹¹

The second stage is known as the retention stage where the memory simply sits in storage untapped.¹² Many portions of a person's memory deteriorate through non-use. The strength or otherwise of a child's memory is dependent on a number of factors: the length of time that has passed, and the number of times the child has been questioned about the event.¹³

The final stage is the retrieval stage. It involves the retrieval of memory from storage. Children have more difficulty than adults in retrieving information from long term memory. Myers and Perry¹⁴ are of the view that although a child needs to possess a minimum degree of memory to be a competent witness, recollection need not be perfect. The accuracy or otherwise of a child's memory may be affected by factors such as age, intelligence, the complexity of the event, the length of time the event was observed and the delay between the event and the trial.¹⁵ Therefore, it cannot be said that children generally have deficient memories.

The child should be able to communicate

A child must have the ability to observe an event, remember it, and to be able to communicate a description of that event in order to be a competent witness.¹⁶ A child must have a certain level of intelligence, vocabulary and conversational skills to communicate effectively.¹⁷ Professionals such as developmental psychologists state that children as young as five years have the communication skills to effectively relate what they know.¹⁸ A child should not be regarded as incompetent merely because he or she hesitates or refuses to answer questions. Hesitancy or refusal to respond may be attributable to other factors which have nothing to do with competency, such as stress for example. It is widely accepted that although children sometimes communicate differently from adults by using child-like language, this does not prevent them from testifying truthfully, accurately and in a manner which can be understood.¹⁹

¹¹ Ibid.

¹² K Müller and Hollely op cit (n7) 192-3.

¹³ K Müller and Hollely op cit (n7) 193.

¹⁴ Op cit (n4) 88, see also K Müller and Hollely op cit (n7) 193.

¹⁵ Ibid.

¹⁶ Myers and Perry op cit (n4) 84.

¹⁷ K Müller and Holley op cit (n7) 185.

¹⁸ Myers and Perry op cit (n4) 84-5; J Selkin *The child sexual abuse case in the courtroom* (1991) 43-5.

¹⁹ Myers and Perry op cit (n4) 85.

The child must appreciate the obligation to testify truthfully

In most jurisdictions, including ours, children are required to understand the difference between the truth and falsehood and to appreciate the obligation to tell the truth. The majority of pre-schoolers meet these requirements.²⁰ Three-year-old children can comprehend the duty to tell the truth; however, triers of fact should allow children to fulfil this requirement in child-like language.²¹

Recent years have seen an increased interest in cognitive psychology and child development and the willingness of experts from different fields to work together in an attempt to alleviate the plight of child witnesses. Consequent research has resulted in a reappraisal of earlier beliefs and a realization that children's ability to give evidence has been greatly underestimated.²² Through empirical research Fouche, Hammond and Hammond²³ came to this conclusion:

'Our results show clearly that while young children do not perform as well as older children or adults, they are far from incompetent. Indeed, in the spatial memory task, they performed better than adults did. Furthermore, their performance showed no tendency to decline with the passage of time.'

Berliner and Barbieri²⁴ state that, although adults are often sceptical when children report sexual abuse, there is little evidence indicating that children's reports are unreliable, and none at all to support the fear that children often make false accusations of sexual assault or misinterpret adults' behaviour. Zieff,²⁵ when commenting on the reliability of child witnesses, argues that experimental data from psychological research has played an important role in dispelling the myths or beliefs regarding the truthfulness of children's evidence. He is of the view that studies from this field suggest that children's ability to answer questions, witness or experience events is better than both law and common belief formerly recognized. Moreover, young children can respond to the demands of testifying when questions are posed

²⁰ Ibid.

²¹ Myers and Perry op cit (n4) 99.

²² PJ Schwikkard 'The abused child: A few rules of evidence considered' (1996) *Acta Juridica* 148 at 152.

²³ GN Fouche, JC Hammond and EJ Hammond 'The child witness' (1987) 3 *University of Natal Law Review* 71; P Zieff 'The child as a witness in sexual abuse cases – A comparative analysis of the law of evidence and procedure' (1991) 4 *SACJ* 21.

²⁴ L Berliner and MK Barbieri 'The testimony of the child victim of sexual assault' (1984) 40 *Journal of Social Issues* 125 at 127, H Combrinck 'Monsters under the bed: Challenging existing views on the credibility of child witnesses in sexual offence cases' (1995) 8 *SACJ* 326 at 328.

²⁵ Op cit (n23) 22.

in a developmentally appropriate way.²⁶ Data has shown that there is no basis for the argument or belief that more false charges are laid in regard to sexual offences than any other type of offence.

It is thus of utmost importance to consider the child's age and stage of moral development when assessing the youngster's comprehension of the obligation to be truthful.

Competency examinations: recent South African Case Law

Under South African law, everyone is presumed to be a competent witness, and young children are competent witnesses if, in the opinion of the court, they understand what it means to speak the truth.²⁷ Section 192 of the Criminal Procedure Act²⁸ stipulates that: '[E]very person...shall...be competent and compellable to give evidence in criminal proceedings.'

It is clear from the Act that there is no age limit in competency and very young children have been allowed to give evidence. Nevertheless, the presumption of incompetence still exists, as children are required to pass a test before their evidence can be admitted. In terms of s 161(1) of the Act no person may be examined as a witness unless he or she is under oath. The provisions of the section are peremptory. There are, however, instances where a witness may give unsworn evidence. In terms of s 164 (1) of the Act a child can give unsworn evidence, or give evidence without making an affirmation, provided he or she is admonished to speak the truth. In practice, the enquiry centres on whether the child is old enough and mature enough to give evidence at all.²⁹ The magistrate or judge has to be satisfied that the child understands what it means to speak the truth. It is clear that a child must, in order to pass the competency test, be able to demonstrate the ability to tell the truth from a lie and know that it is wrong to tell a lie. If the child is unable to do so, he or she cannot be admonished to tell the truth and he or she is therefore, an incompetent witness. The interpretation of this section by presiding officers has resulted in the effective exclusion of young witnesses from the criminal justice system.

In *S v N*³⁰ the appellant was charged with indecent assault and sentenced to three years' imprisonment. In an appeal against the conviction and sentence the court of appeal examined the proceedings of the regional court concerning the administration of an oath to the complainant. Van Reenen J held that where a witness, due to a lack of formal education or any other

²⁶ Ibid.

²⁷ Hoffmann and DT Zeffertt *The South African Law of evidence* (1989) 375.

²⁸ 51 of 1977.

²⁹ Hoffmann and Zeffertt op cit (n27) 376-7.

³⁰ 1996 (2) SACR 225 (C).

reason, might not have the required capacity, the court must, before administering the oath, enquire whether such a witness understands the meaning of and possesses the capacity to appreciate and accept the religious sanction of an oath.³¹ Van Reenen J added that if after such an enquiry the court finds that the witness does not possess the required capacity, it should determine whether or not he or she understands what it means to speak the truth and the consequences of lying. If the witness is unable to do so, he or she should be regarded as incompetent to give evidence. A witness must be shown to have understood the meaning and religious sanction of an oath and this involves a factual enquiry. Therefore, the testimony of a witness who has not been placed under oath properly has not made a proper affirmation or has not properly been admonished to speak the truth as provided for in the Act, lacks the status and character of evidence.³²

In *S v Seymour*³³ the appellant was convicted of murder in the regional court on the evidence of a thirteen-year-old boy. It appeared on the evidence that the boy did not understand the nature and meaning of the oath although he could distinguish between the truth and telling lies. On appeal, Meskin J held that it was clear that the witness did not understand the nature and import of the oath. The judge asserted that s 164(1) of the Act can be invoked once the presiding officer has satisfied himself or herself that the witness understands the nature and import of an oath. The judge concluded that the magistrate should not have administered the oath and the witness was incompetent because he did not know the meaning of an oath. The judge further stated that a witness's ability to distinguish between truth and falsity becomes relevant only after the court has concluded that the witness is unable to understand the import and nature of an oath.³⁴

In *S v Malinga*³⁵ the appellant was convicted in the lower court of the rape of a nine-year-old girl. The girl testified during the trial. On appeal it was contended on the appellant's behalf that certain irregularities had occurred during the course of the trial. On appeal the court had to determine whether the provisions of s 164(1) of the Act had been complied with. Moleko AJ, in interpreting the provisions of s 164, stated that their application is subject to the court embarking upon a two-fold enquiry. First, the court has to determine whether the child understands the importance of an oath or

³¹ *S v N* supra (n30) at 229C-E.

³² *S v N* supra (n30) at 230C-E.

³³ 1998 (1) SACR 66 (NPD).

³⁴ *S v Seymour* supra (n33) at 71B-C.

³⁵ 2002 (1) SACR 615 (NPD).

affirmation, failing which the provisions of s 164(1) must be applied.³⁶

Secondly, the presiding officer has to determine whether the child is a competent witness, that is, whether he or she can distinguish between the truth and falsehood. In this case the child's evidence was excluded because an inquiry was not made to determine whether the witness understood the nature and import of an oath. Moreover, the presiding officer did not establish whether the witness knew what it means to speak the truth.

The present authors are of the opinion that neither an oath nor the knowledge of the difference between truth and falsehood, nor the understanding that punishment may follow a lie, guarantees honesty.³⁷ Moral knowledge does not necessarily correspond to moral behaviour.

In examining the child, the judicial officer must be able to conclude that he or she has sufficient intelligence to appreciate the distinction between right and wrong and truth and falsehood, and to recognize the consequences of lying.³⁸ The courts should apply a common sense approach, and the child's answers should lay a foundation for a finding of competency. A child should be allowed to testify if the court has satisfied itself that he or she is capable of giving a truthful and intelligible account of the matter.³⁹ The triers of fact should also look at the demeanour of the child witness, his or her maturity and understanding and consistency of his or her testimony.

It is for this reason that the Supreme Court of Appeal's decision in *S v B*⁴⁰ is to be welcomed. On 15 August 2000, the accused was convicted in the regional court of the rape of a thirteen-year-old girl and was referred to the High Court for sentencing in terms of s 52 of the Criminal Law Amendment Act.⁴¹ In the regional court, the complainant was asked whether she understood what it meant to swear to tell the truth and what it meant if a person said they would tell the truth. When the matter came before the High Court for sentencing the conviction was set aside and substituted with a finding of not guilty. The High Court excluded the evidence of the complainant as there had been no investigation to justify a finding that the witness did not understand the nature and import of the oath or

³⁶ The section reads as follows:

'Any person who, from ignorance arising from youth, defective education, or other cause, is found not to understand the nature and import of an oath or affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation. Provided that such person shall, in lieu of the oath or affirmation be admonished by the presiding Judge or judicial officer to speak the truth and nothing but the truth.'

³⁷ Goodman op cit (n1) 13.

³⁸ J le Roux and J Engelbrecht 'The sexually abused child as a witness' in CJ Davel (ed) *Introduction to child law in South Africa* (2000) 345.

³⁹ Ibid.

⁴⁰ 2003 (1) SACR 52 (SCA).

⁴¹ 105 of 1997.

affirmation due to ignorance arising from youth, defective education or other cause.

On application by the state, the court *a quo* reserved certain questions of law regarding the admissibility of the complainant's evidence. In responding to these questions, the Supreme Court of Appeal found that the relevant section did not expressly require that an investigation be held and it was not required in all the circumstances in order to make a finding. Streicher JA was of the view that the evidence of the complainant was of material importance and could not be ignored. The Supreme Court of Appeal held that the objection to the admissibility of the complainant's evidence was of a technical nature. An understanding on her part of the nature and import of the oath or the affirmation could hardly have made the evidence she gave less reliable. The Supreme Court of Appeal ordered that the case be referred back to the court *a quo* for the hearing of further evidence by the complainant in an attempt to correct the defect in the original presentation of her evidence in the court *a quo*.

In *S v Kondile*,⁴² the accused was convicted of housebreaking with intent to assault, and assault. The conviction on the count of assault was based entirely on the testimony of a ten-year-old child who was assaulted by the accused after he broke into the house. On review, the Ciskei High Court set aside the conviction on the count of assault on the grounds that the complainant's evidence was inadmissible. Ebrahim J held that s 164 of the Act required an enquiry before the decision to administer the admonition be taken. Ebrahim J was of the view that the magistrate should have conducted a proper enquiry to establish whether the child witness was able to distinguish between the truth and a lie and the consequences that might flow from telling lies. The question asked of the witness by the magistrate could not establish these pertinent issues. The judge held, therefore, that competence and the justification for admonishing the witness must be established. This decision is contrary to that reached by the Supreme Court of Appeal in *S v B*⁴³ which held that s 164 did not expressly require that an investigation be held.

The above cases and the different decisions arrived at give credence to our argument that the presumption of competence should apply to children, and the reliability or otherwise of their evidence should be determined from the evidence.

The South African Law Commission supported the view that the competency requirement is commonly used as an exclusionary mechanism in that a witness's competency to testify is restricted to the provisions of the

⁴² 2003 (2) SACR 221 (CKH).

⁴³ Supra (n40) 52, see N Whitear-Nel 'Admissibility of children's evidence' (2004) 17 SACJ 131 at 133.

Criminal Procedure Act. The Commission⁴⁴ stated that presiding officers do not have the necessary skills to make an assessment of the witness's cognitive abilities. The Commission recommended that a witness should not be disqualified from testifying if found to be unable to define the difference between the truth and a lie.⁴⁵ The test instead should be whether a witness is able to understand questions put before him or her and in return supply answers the court can understand.⁴⁶ If it is uncertain whether a witness is capable of communicating, an expert should be called to assist. The child should be allowed to give unsworn evidence, and the presiding officer should decide on the weight to be attached to such evidence. The child should nevertheless, depending on the seriousness of the proceedings, be enjoined to tell the truth.⁴⁷

The South African Law Commission⁴⁸ has recommended that s 164(1) of the Act be amended and that all witnesses below the age of 18 years be regarded competent to testify. The test should be whether a witness understands the questions put to him or her and is able to give answers that the court can understand. Competency to testify may only be excluded if a witness lacks the mental and/or verbal skills to respond to questions in a manner that can be understood in court.

The Commission further recommends that a child should be allowed to give unsworn evidence if found to be unable to take an oath. Certain conditions have to be met, the child must understand questions put to him or her and be able to respond to such questions in an intelligible manner. If evidence is given unsworn, the child must be admonished to speak the truth.

The cognitive development of young children

A child who is required to give evidence in court either as a witness or a complainant is faced with numerous challenges. He or she might be required to show an understanding of the world in which he or she lives. This is referred to as a manifestation of the cognitive development of the child, and it involves changes in children's intellectual abilities and their knowledge of the world throughout their course of development.

⁴⁴ South African Law Commission Discussion Paper 102 (Project 107): *Sexual Offences: Process and Procedure* (2001) at para 36.4.3.

⁴⁵ *Op cit* (n44) at para 36.4.5.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ South African Law Commission (Project 107) *Report on Sexual Offences* (2002) at para 4.3.4.

It is important for judicial officers and attorneys to have knowledge and be trained on matters relating to the development of young children.⁴⁹ Goodman submits, correctly in our view, that training in child development at the very least is important for obtaining accurate testimony from children. She supports this assertion by providing this example:

'A child, three years of age, who had been abducted from her home by a strange man, described on the day she was found how the "gordle pushed her and made her bleed" and how the "gordle scratched her arm". In their report, the police wrote that she said, "him pushed me and made me bleed". But the screening of the audio taped interview by an expert in children's testimony and consultations with the child's mother revealed that "gordle" was this three-year-old's word for girl. The possibility therefore arose that the man who kidnapped her had an accomplice (a possibility made plausible by other evidence as well).'⁵⁰

Goodman states, as this example also illustrates, that children sometimes attempt to provide crucial details, but people who lack training in child development could easily fail to understand them.

The section below discusses developmental changes in children's representation of the world as these developmental changes impact on children's ability as witnesses.

Enactive representation

This form of representation occurs at infancy. Young children cannot separate themselves from the world and objects in it, therefore they have to define events by the actions they evoke.⁵¹ Myers and Perry⁵² refer to this point in the child's life as the sensation-bound stage. They are of the view that children are at this juncture faced with a number of challenges. For instance, children must learn to define things by manipulation and try to record the existence of objects in memory.⁵³ It is unlikely for attorneys to work with children at this stage. It is nevertheless not unusual for older children to regress to this level after they have been severely traumatized.⁵⁴ In the event of this happening, children should be allowed to give their testimony in an enactive way by allowing them to use anatomically correct dolls or other props.⁵⁵

⁴⁹ GS Goodman 'The child witness: Conclusions and future directions for research and legal practice' (1984) 40 *Journal of Social Issues* 157 at 164.

⁵⁰ Ibid.

⁵¹ Myers and Perry op cit (n4) 473.

⁵² Ibid.

⁵³ Ibid; see also K Müller and Hollely op cit (n7) 177.

⁵⁴ Ibid.

⁵⁵ Myers and Perry op cit (n4) at 474.

Imaginal representation

Children begin to rely upon imaginable representation at the age of two.⁵⁶ Children use their memories to store mental pictures of what they have encountered. It is technically possible for a child at this stage to serve as a witness. Children as young as two to three years are able to store an accurate image of the scene and retain it through adulthood as long as they attended and perceived an event accurately.⁵⁷ Attorneys working with children must always bear in mind that children between the ages of two and three and, in some instances older children, may have substantial difficulty in spontaneously offering information through free recall.⁵⁸ It is therefore the responsibility of attorneys and other triers of fact to elicit information through artful questioning. Use should be made of simple, direct, non-leading questions that are able to tap into the details of the stored image.⁵⁹

Linguistic representation

In order to participate in court as a witness, a child must have the ability to communicate in a manner that can be understood by adults.⁶⁰

Myers and Perry⁶¹ are of the view that words and symbols are a much more powerful form of representation than patterns or images. Words allow children to both represent experiences and transform them. Unfortunately, words may be one step removed from the vivid mental snapshot of early childhood, and can therefore distort memory.⁶² Although the linguistic abilities of young children may be an asset in preventing memory distortions, their immaturity may nevertheless cause problems in other areas.⁶³ For example, early stages of linguistic representation sometimes result in miscommunication, hence attorneys and the courts working with children must be adept at communicating on the child's level.⁶⁴

Categorical representation

This form of representation allows children to divide the diversity of the world into manageable concepts, for instance:

[I]f the child were asked, "Did the man take off his clothes?" he or she might respond "No", but if asked, "Did the man take off his pants?" he or she might

⁵⁶ Myers and Perry op cit (n4) at 472.

⁵⁷ Myers and Perry op cit (n4) 474, see K Müller and Hollely op cit (n7) 177.

⁵⁸ Myers and Perry op cit (n4) 475.

⁵⁹ Ibid.

⁶⁰ K Müller and Hollely op cit (n7) 185.

⁶¹ Myers and Perry op cit (n4) 474.

⁶² Ibid.

⁶³ Myers and Perry op cit (n4) 475, see Goodman op cit (n49) 164.

⁶⁴ K Müller and Hollely op cit (n7) 189.

respond “yes”. In the questioner’s mind, the first question might subsume the second, but for the child, clothes and pants may be two distinct ideas. Thus the child’s testimony may appear to be inconsistent when it really is not.⁶⁵

Triers of fact should always be careful when asking questions that call for a categorization by the child based on concepts of kind and unkind. The authors state that the question ‘Is your mother kind to you?’ calls for an opinion or categorization by the child based on concepts of kind and unkind.⁶⁶ Although categorical questions may be helpful, their dangers are that they may at times result in inaccurate testimony.

Children should be asked to describe specific incidents.⁶⁷ Young children are not adept at interpreting information with the result that they might oversimplify complex information. In most cases children perceive things as good or bad, heroic or evil. The shades of grey that often characterize real life are unknown to them.⁶⁸

Cognitive limitations of young children

Adults should try to determine the child’s cognitive development. The latter is based on the premise that children show similar mental, emotional and social abilities, and undergo similar changes at roughly comparable ages.⁶⁹ The child’s cognitive development is important in that it helps to explain the child’s inconsistencies or otherwise when relating events.⁷⁰ Generally children between the ages of three to six years can be competent and effective as witnesses. However, attorneys should acknowledge that the abilities of children are limited.

First, triers of fact should always bear in mind that children are self-centred in that they are unable to see things from other people’s perspective.⁷¹ They should therefore be asked to describe events from their own perspective. Secondly, triers of fact should bear in mind that although children may be able to arrange objects or images in a series, they cannot draw on inferences about non-adjacent components.⁷² For example, the child may be able to think about three men, Bill, Tom and Sam and conclude that Bill is taller than Tom and Sam is taller than Bill, but be unable to figure out the answer to the

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Myers and Perry op cit (n4) 474.

⁶⁹ K Müller and Hollely op cit (n7) 174.

⁷⁰ K Müller and Hollely op cit (n7) 175.

⁷¹ Myers and Perry op cit (n4) 477; Goodman op cit (n1) 11-4.

⁷² Myers and Perry op cit (n4) 477.

question 'who is the tallest?'⁷³ Attorneys can avoid confusing the child by requiring the child to give simple descriptions instead of requiring them to make comparisons.⁷⁴

Conclusion

Child abuse has become a highly prevalent social evil in South Africa. Now, more than ever, the community expect the perpetrators of this heinous crime to be brought to justice. The South African criminal justice system is tasked to prosecute, convict and punish convicted criminals in child sexual abuse cases.

This article explains the difficulty in obtaining this precise result, especially where the victim is a very young child. Due to the suspicion and ignorance of adults, young children are often excluded from the criminal justice system by being characterized as unreliable witnesses.

Apart from briefly explaining the various developmental changes in the cognitive development of young children, this article emphasizes the crucial need for the training of attorneys and judicial officers in the cognitive development of young children. This will prevent young children from merely being excluded from the criminal justice process. Moreover, more convictions in cases of child sexual abuse might be obtained.

It is envisaged that the Appeal Court's decision in *S v B*⁷⁵ will have an enormous positive impact on setting South Africa on the path to a system of justice for victims of child sexual abuse. The Court of Appeal stated very clearly that justice not only requires that an innocent person should not be wrongly convicted, but also that a person who committed a crime should be duly punished for it. It is clear from this decision that the inability of a child witness, due to youthfulness, to understand the nature or import of an oath will have no impact on the reliability of the testimony given by such a child. The evidence of such a child thus cannot be disregarded when it comes to evaluating the merits of a case.

We support the view that triers of fact should not always treat the evidence of a child witness with caution and must not call for corroboration of evidence solely on account of the fact that the witness is the complainant of a sexual offence or a child.⁷⁶ Section 10 of the Children's Bill⁷⁷ stipulates that every child who is capable of participating meaningfully in criminal

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Supra (n40) 52.

⁷⁶ Section 18 subsecs (a) and (b) of the Criminal Law (Sexual Offences) Amendment Bill 2003.

⁷⁷ B 70–2003.

proceedings concerning that child has a right to participate in those proceedings and views expressed by such child should be taken into consideration. We recommend that the court should determine from the evidence whether a child is truthful or not. Triers of fact should also have regard to the child's maturity, his or her ability to communicate and whether or not he or she is able to respond to simple questions. The court should look at whether a child is able to give a rational account of events because if able to, he or she will also appreciate the importance of speaking the truth.